IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

SOUTHERN CONSTRUCTORS, INC.,	}	
Claimant,	}	
v.	}	**Claims Commission No. 20070225**
STATE OF TENNESSEE,	}	
Defendant.	}	

DECISION REGARDING AMOUNTS OF UNIT PRICE ADJUSTMENTS, INTEREST, AND ATTORNEY'S FEES

This matter initially came on for hearing before the undersigned on September 22, 2008, on the Claimant's, Southern Constructors, Inc.'s ("SCI"), Motion for Partial Summary Judgment and Motion to Amend. Based upon the Claimant's Motion, the State's responses thereto, including all supporting filings and/or responses, the arguments of counsel at the September 22, 2008, hearing, applicable legal precedent, and the record as a whole in the case, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

SCI's Motion for Partial Summary Judgment and Motion to Amend are hereby **GRANTED** for the reasons more specifically set forth in the Transcript of the Commission's bench decision attached hereto as Exhibit 1 and incorporated specifically herein by reference. SCI's Amended Complaint shall be deemed filed as of August 18, 2008. In addition, all matters which the defendant has agreed are undisputed as set forth in its Response to SCI's Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment, a copy of which is attached hereto as Exhibit 2, are hereby established for purposes of trial pursuant to Rule 56.05 of the Tennessee Rules of Civil Procedure, considered under.

Having ruled in the Claimant's favor on the underlying issue of whether the State breached its contract with SCI, the claim came on for further hearing before the undersigned on September 24, 2008, in the Chancery Court courtroom in Dandridge, Tennessee.

The issues before the Commission at that time were three-fold. First, the Commission heard evidence regarding the nine (9) items of construction costs set out in Exhibits 11 and 12. Additionally, the Commission heard proof regarding whether the Claimant is entitled to interest and attorney's fees as provided for in the Prompt Pay Act of 1991, Tennessee Code Annotated, Section 66-34-101, et. seq.

Actually, the evidence heard on September 24, 2008, sets forth in great detail the complete underlying factual background in this case including those facts the Commission believes support its decision on the core issue of breach of contract.[1]

As set out in the Commission's prior ruling from the bench, this dispute arose when SCI sought to avail itself of the provisions of Section 104.02 of the Specifications for Contract Number CNC243 with the Tennessee Department of Transportation ("TDOT") entered into on July 23, 2004, which provided, as discussed previously, that in the event of a significant change to a major item of work on the project, SCI could apply for an adjustment of the amounts it was to be paid under the contract. In this instance, the significant change was a decrease in the amount of partial and full depth square yardage repairs SCI was required to complete on the Henley Street repair project, below seventy-five percent (75%) of what the contact had originally anticipated.

The Henley Street repair project involved work on a major thoroughfare over the Tennessee River in Knoxville, Tennessee. The Henley Street Bridge provides a heavily traveled means of

[1] There is one volume of the testimony in this case and references to that testimony in this opinion will be to "TR__". References to a particular Exhibit will be to "EXH__".

ingress and egress for persons coming to Knoxville from South Knox County, Sevier County, and Blount County. There is no dispute between the parties that a rapid completion of this project was important to the economy of Knoxville and its surrounding areas and a goal of both parties.

The contractor was under significant pressure to complete this project on or before August 31, 2004. SCI began its work on July 5, 2004, and was able to complete the same by August 5, 2004. The contactor had an obvious incentive to complete the work early since it was eligible for a bonus of up to Seventy Thousand Dollars ($70,000.00) if it was able to complete the work at least twelve (12) days in advance of the contracted for completion date of August 31, 2004. However, if SCI was unable to complete all the work by August 31, 2004, then it would suffer a Five Thousand Dollars ($5,000.00) a day penalty for every day it was late in finishing the work. There was no cap on the amount which it might be assessed as a penalty.

The estimated cost of the entire contract, set out in TDOT's Proposal Contract, was Seven Hundred and Ninety-Nine Thousand Five Hundred and Sixty-Three Dollars ($799,563.00). To date, SCI has been paid Six Hundred and Ninety-one Thousand Two Hundred and Thirty-six 24/100 Dollars ($691,236.24). As discussed previously in the Commission's bench decision on the underlying breach of contract issue, this dispute arose because the amounts of partial depth and full depth repairs to the bridge's deck were significantly less than what both parties had contemplated during the bidding process. In fact, the partial depth repairs were only forty-three percent (43%) of the twenty-eight hundred (2,800) square yards originally anticipated by TDOT, while the full depth repairs were approximately fifty-seven percent (57%) of what the State estimated originally. To be sure these underestimations are not indicative of bad faith on the part of the State or the contractor since as the proof shows, it is extremely difficult for engineers to accurately define what work is needed until the materials overlaying the bridge deck are stripped off and a closer inspection is

possible.

Further, it is important to note that the parties to this dispute are well known to each other since SCI has performed a significant amount of work for the TDOT. In fact, its President, Richard Huskey, who testified at trial, previously worked for TDOT as a student and was supervised by TDOT Assistant Chief Engineer Steve Hall. There is no evidence whatsoever of any pre-existing acrimony between the parties prior to this unfortunate dispute.

As stated above, the proof in this case on September 24, 2008, consisted of much of what the Commission would have expected had the Claimant's motion for partial summary judgment been denied. That, of course, is important should either party appeal any aspect of this case.

What remains for decision now are the issues of what items of additional adjustment costs SCI is entitled to payment for, as well as the matter of interest on those costs and attorney's fees should the Commission determine the State acted in "bad faith" in denying SCI's claim.

I. The Proof

Work on the contract in this case began on July 5, 2004, and had a required completion date of August 31, 2004. However, SCI was able to complete the work by August 5, 2004. (EXH 1, TR31) The original contract amount was Seven Hundred Ninety-Nine Thousand Five Hundred Sixty-Three Dollars ($799,563.00) and to date, SCI has been paid Six Hundred Ninety-One Thousand Two Hundred Thirty-Six and 24/100 Dollars ($691,236.24), not counting the early completion bonus of Seventy Thousand Dollars ($70,000.00). The Supplemental Agreement ("SA") amount sought by SCI in this case of Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars ($81,593.01), when added to what has already been paid, would result in total payments of Seven Hundred Seventy-Two Thousand Eight Hundred Twenty-Nine and 25/100 Dollars ($772,829.25) to SCI, some Twenty-seven Thousand Dollars ($27,000.00) less than what TDOT

estimated would be the costs under this contract. (TR 69) The Commission previously discussed the Five Thousand Dollar ($5,000.00) per day incentive and disincentive for work completed early or late. Accordingly, Mr. Huskey testified he had scheduled crews to work around the clock in order to avoid the penalty and earn the bonus. (TR 33) Mr. Huskey pointed out that the contract had a certain degree of risk both for SCI and TDOT. For example, if quantity underruns were less than twenty-five percent (25%), then SCI ran the risk of having planned to do more work than it actually did with no possibility of recovering its costs. On the other hand, if the amount of work actually done by SCI for the State was less than one hundred twenty-five percent (125%) of what was contracted for, then the State did not have the right to ask for an adjustment in its per item costs. The seventy-five percent (75%) and one hundred twenty-five percent (125%) floor and ceiling obviously left each of the contracting parties at some risk for absorbing costs not originally anticipated. (TR 80)

Longtime State employee, professional engineer Pete Falkenberg, who at the time was Assistant Director of Construction for Region I of the State, testified that TDOT itself had utilized this contract provision when quantities had exceeded one hundred twenty-five percent (125%) of estimates and that the seventy-five percent (75%) figure had been implemented when quantities used on a contract went below seventy-five percent (75%) of an estimate. (TR 120 and 124) On the other hand, Assistant Chief Engineer for Operations Steve Hall, a 29 ½ year veteran of TDOT, testified there was no indication in State files that this provision had been used by the State to request a price reduction.

When it became apparent to Mr. Huskey that he had bid and performed a job which required less work than had been anticipated, he began the SA process in December of 2004. (TR 74) This was a Category 1 SA which must be approved by the Commissioner of the Department of Transportation. (EXH 5, TR 177-178, 204) Although he has done many projects for the State, Mr.

Huskey testified SCI had never used this provision in order to request additional monies. (TR 76) He signed the proposed SA on behalf of SCI on December 7, 2004. (TR 61) Subsequently, Huskey contacted TDOT officials at the Knoxville regional office up through March of 2005, following which he discussed processing of the SA with Mr. Falkenberg around Christmas of 2005. Initially, on May 9, 2005, Assistant Chief Engineer of Operations Hall approved SCI's SA. When he did not receive payment on the SA, Mr. Huskey continued his conversations with Mr. Falkenberg, and eventually Mr. Hall. (TR 105-106) On March 1, 2006, he received a letter from Mr. Hall, reversing his previous decision to approve the SA, and denying the same because of how SCI had allocated its fixed costs in the contract and also because a note[2] on Exhibit 4 overrode, in Hall's view, Section 104.02[3] of the State's Specifications dealing with significant changes to major items of work. (EXHS 2 and 10) Mr. Falkenberg testified this particular sort of situation had come up infrequently during his career. (TR 123)

Interestingly, a gentleman named Dwayne Seger, who is Chief of the Bridge Repair Department with TDOT, did not testify in this matter. (TR 173) Witness Clint Bane testified that an e-mail from Mr. Seger to Mr. Hall expressed concern about a note found on the plans and some of the costs which Mr. Huskey sought in his proposed SA. (TR 175) Mr. Hall testified that once he

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[2] Exhibit 2 - Section 104.02 - Significant Changes in the Character of Work:

(1) The engineer reserves the right to make at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project.

(2) If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.

(3) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

(4) The term 'significant change' shall be construed to apply only to the following circumstances:

(a) when the character of the work as altered differs materially in the kind or nature from that involved or included in the original proposed construction or

(b) when a major item of work is increased in excess of 125% or decreased below 75% of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125% of original contract item quantity, or to the amount of work performed in case of a decrease below 75%.

[3] Exhibit 4 – NOTE: ITEM NO. 604-10.30 AND 604-10.50 SHALL BE BID WITH THE CONTINGENCY THAT THESE ITEMS MAY BE INCREASED, DECREASED, OR ELIMINATED AS DIRECTED BY THE ENGINEER.

contacted Mr. Seger, it was Seger's opinion the SA should not be agreed to. (TR 206) Again, Mr. Seger was not called and did not testify in this matter.

Following submission of the SA, Mr. Braden, the Project Supervisor for the Henley Street bridge project, approved Mr. Huskey's computations as did Mr. Bane, the Regional Construction Supervisor. (TR 51) Mr. Huskey testified that once Mr. Bane and Mr. Braden signed off on the SA that Region I Director, longtime State official Fred Corum, signed the same and forwarded it to Nashville for consideration. (TR 60-61) Subsequently, personnel in the Region I office in Knoxville indicated to Mr. Huskey that the hold up in payment of the SA was occurring in Nashville. (TR 63) Following receipt of this information, Mr. Huskey began his conversations with Mr. Falkenberg. (TR 63) Around Christmas of 2005, Mr. Huskey had his first conversation with Steve Hall. (TR 64) It should be recalled that on May 7, 2005, Mr. Hall initially recommended approval of SCI's requested adjustments in a cover letter sent to Nashville. (EXH 8)

Finally, Mr. Huskey called Mr. Hall personally and Hall told him for the first time the reason TDOT was not going to pay an adjustment on the contract was the fact that SCI received the incentive bonus, and that those monies should more than offset any need for an adjustment in SCI's fixed costs. (TR 63) In a second phone conversation with Mr. Hall, Mr. Huskey was told there was also a conflict between the note in the upper left-hand corner of Exhibit 4 and the specifications for the job set out in Specifications, Section 104.02, and that this conflict was the reason TDOT was not going to pay any adjustments because of the reduced amount of work done. (EXHS 2 and 4) and (TR 63)

Mr. Huskey testified he was aware that the Commissioner of TDOT would have to sign off on this project in order for him to be paid. At trial, Mr. Hall testified the Commissioner himself never denied this claim. (TR 230) However, in the State's Answer to SCI's Interrogatories (EXH

17), Mr. Hall stated the Commissioner had final authority to approve or disapprove a SA and had denied SCI's request here for a price adjustment. (EXH 17, p. 5, TR 230) At trial, Mr. Hall stated that since he was acting for the Commissioner in this case, and since he (Hall) denied it, he interpreted the interrogatory answer to mean that, in fact, the Commissioner had denied it through him. (TR 231)

Mr. Falkenberg, whose testimony has previously been referenced, stated that he retired from TDOT after 31 years and that his last job there was as Assistant Director of Construction for Region I of the State of Tennessee. The Henley Street Bridge is located in Region 1. (TR 111) Mr. Falkenberg is a licensed Professional Engineer. He approved the SA on May 9, 2005. (TR 112-1) Previously, TDOT Regional Director Corum had signed the agreement. (TR 115) Mr. Falkenberg thought the Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars ($81,593.01) request from SCI was reasonable, and it was his understanding that it had been negotiated between the parties. (TR 117-118) Mr. Falkenberg did not and does not agree with TDOT's decision to deny this claim since he felt the provision in the contract dealt "directly" with this particular type of situation. (TR 120) He discussed this matter with his supervisor, Mr. David Donoho, Construction Division Director for TDOT, as well as with Assistant Chief Engineer of Operations, Mr. Hall, as it made its way through the approval process and was surprised when it was denied. (TR 125) In fact, his supervisor, Mr. Donoho, also had initialed the SA. (TR 125)

At the time the contract was let, Mr. Falkenberg testified that TDOT did not review what costs had been included in fixed costs and what costs were put into particular categories of work to be done on the project. (TR 129)

It was his understanding that the Commissioner of TDOT had a question about the SA and needed more information in order to make a decision. He did not remember whether the

Commissioner had said not to pay the claim. (TR 133)

Mr. Falkenberg admitted that Project Supervisor Braden could not bind TDOT in approving the claim and that ultimately the only person who had the authority to bind TDOT was the Commissioner. (TR 135)

The fact that SCI earned a bonus on this job could not, in Falkenberg's opinion, "...be the basis for denying the Supplement. It would not be correct to do that." (TR 147) When asked specifically whether he believed there was bad faith in the denial of this SA, Mr. Falkenberg stated, "At the time I reviewed this and talked to the regional prior to my final review and approval, I felt like it was the right thing to do, ... and I felt like it was kind of a black and white situation. I felt like it should be approved and I still do, that it's the right thing to do." (TR 149-150) Mr. Falkenberg believed that if the Commissioner had declined to sign off on this SA, he would have had someone prepare a formal response. (TR 142)

James Braden was Project Supervisor on the Henley Street job. (TR 152) Mr. Braden is not a licensed engineer but has been a project supervisor for the State for ten to fifteen years. Mr. Braden was present on the project site almost constantly during its life and he, Region I Construction Supervisor Clint Bane, and Assistant Region I Construction Supervisor Duane Manning reviewed the figures provided to them by Mr. Huskey and agreed the requested SA amount was appropriate. (TR 155) He testified that he thought SCI met the criteria for an adjustment as set out in the specs. (TR 156)

Clint Bane also testified. He admitted that he signed off on the authorization to proceed with payment of the SA. (EXH 5, TR168) Bane also said he would not have approved the SA if he had known the note set out in the upper left-hand corner of Exhibit 4 existed since he felt the note superseded Specification 104.02. (TR 180) It was his opinion that the basis for the denial of SCI's

claim was "solely" the note found on Exhibit 4. (TR 184) Bane was also willing to take the blame for the rejection of the SA because of his "oversight" of the note as it applied to the proposed adjustment. (TR 186)

Fred Corum's Assistant Director for Region I, Steve Borden, also testified. Mr. Borden is a licensed engineer and was Assistant Regional Director in July and August of 2004. (TR 188) Mr. Borden denied that the basis for the rejection of the adjustment in this case was because SCI received a Seventy Thousand Dollar ($70,000.00) early completion bonus. (TR 189) However, at his deposition, he testified Mr. Hall denied the claim since SCI performed less work and received a bonus and that the reduced amount of work made it possible for the contractor to proceed more quickly. (TR 190) Also at his deposition, Mr. Borden testified that receipt of a bonus did not conflict with SCI's right to request a unit price adjustment. (TR 190) Mr. Borden also testified that on Exhibit 5 the method of payment box was marked in the "negotiated price" section. (TR 193)

Finally, TDOT Assistant Chief Engineer of Operations Steve Hall testified on behalf of the State. Mr. Hall admitted that originally he recommended approval of the claim for the Commissioner's signature. (TR 204) Subsequently, the Commissioner wrote back to Mr. Hall, in his own hand, that he needed "explanation" on the approval. (TR 205) Mr. Hall did not recall exactly when he recommended the SA for approval to the Commissioner. (TR 206) Mr. Hall stated he based his decision to reverse his prior conclusion and deny the claim on the conflict between the note on Exhibit 4 and the provisions set out for unit adjustments in Exhibit 2. It was his position that the contractor had been told, in the note, that it should bid the project with the note in mind.

At his pre-trial deposition, Mr. Hall testified that Exhibits 2 and 4 were not in conflict and that Exhibit 2 merely told the contractor it could "request" a change in unit price, but the note in Exhibit 4, in turn, told the contractor "you should have expected this [adjustments in amounts] and

not put all your money in this place." (TR 208) At trial, Mr. Hall again testified there was no conflict between Exhibits 2 and 4. (TR 227) This is at variance with the contents of his letter to Mr. Huskey of March 1, 2006, where he emphasized a conflict between language in Exhibits 2 and 4. (TR 227, EXH 10) Mr. Hall also testified at trial that if there was a discrepancy between the two provisions, it should be pointed out that the Standard Specification 104.02 would be overridden by the note on the plans, found in the upper left-hand corner of this "no plans" contract. (TR 210) Mr. Hall testified that notes such as those found on Exhibit 2 are included "to indicate to the bidders, if you have fixed costs, you know, don't put all your eggs in this basket, cause these quantities may change." (TR 211)

Additionally, Mr. Hall testified at trial that certainly the fact that SCI had gotten a bonus was something that should be considered in reviewing the SA. (TR 212) Finally, Mr. Hall testified that when the Commissioner requested an explanation, he never took the issue back to him since he knew Mr. Nicely would be concerned about changing unit prices. (TR 223) Mr. Hall testified there was a delay in giving the final decision to Mr. Huskey because no one wanted to be the individual to tell him. (TR 215)

It is SCI's contention that bad faith was established in this case in the Commissioner's note to Mr. Hall indicating an explanation was needed since that was a signal or code word for Hall to deny the claim, and that Hall sat on the claim from at least Christmas of 2005 until March 1, 2006, when a formal written denial issued. (TR 98)

There also was a conflict in the testimony regarding the approval of SAs. In his thirty-one (31) years of experience with TDOT, Mr. Falkenberg stated that SAs were infrequently rejected. (TR 147) However, Mr. Borden testified it was not uncommon for SAs to be rejected and at another point, that a good portion of the SAs do get turned down. (TR 202)

There are nine (9) categories of costs for which Claimant contends it should receive a unit price adjustment since it committed excessive resources for what was actually necessary to complete the project. Those categories are as follows: 1) longshoreman's insurance; 2) railroad protective insurance; 3) railroad flagman; 4) bridge access (Snooper/Hydra-Platform); 5) containment materials and equipment; 6) jackhammers and compressors; 7) saw blades and bits; 8) Bobcat rental; and 9) wasted labor. The amounts requested for these unit price adjustment items are set out in Exhibits 11 and 12.

During the bidding process, Mr. Falkenberg testified bids are reviewed and checked to determine if too much of the work is being allocated to what are known as mobilization costs. Mobilization costs, according to the proof, are usually limited in amount to five percent (5%) of the total contract price. Apparently, this five percent (5%) is paid to the winning bidder in advance. Therefore, bidders want to be paid as much as they can under the mobilization costs category since payments for those items are made on the front end of the project rather than as the project progresses and after it is finished. Final payments sometimes are delayed through a protracted process. In other words, those costs which are front-end loaded are paid earlier and thus, in the contractor's view, it is not financing TDOT projects while TDOT processes subsequent payments.

On this particular job, the proof was that SCI had included Thirty-Nine Thousand Dollars ($39,000.00) for mobilization costs in its bid, whereas TDOT engineers originally estimated that only Thirty Thousand Dollars ($30,000.00) should be placed in that category. Further, three bidders had actually bid more in the mobilization cost category while two had bid less. (TR 101-102) The proof in the record is also clear that in the event mobilization costs exceeded five percent (5%) of the total contract amount, TDOT may require a new bid or require the bidder to adjust mobilization costs.

A good deal of the dispute in this case centers around, as set out in Mr. Hall's letter of March 1, 2006 (Exhibit 10), whether or not SCI should have allocated the items enumerated in Exhibits 11 and 12 to mobilization costs rather than to cost centers set up for the partial and full depth repairs. (See Exhibits 10, 11, and 12) The State appears to argue that had some of the costs set out in Exhibits 11 and 12 been allocated to mobilization costs, then SCI would not have been in a position to request unit adjustments for the partial and full depth cost centers.

Mr. Huskey testified the questioned costs were placed under the partial and full depth repair categories since they were, in fact, the only two items of work on this project. (TR 38) He also testified that the four categories of costs questioned in Mr. Hall's memo (EXH 9) involving two insurance policies, saw blades and bits, and wasted labor were all paid by SCI at the time they were obtained. It is his position that the saw blades and bits and the insurance were paid for before the project began since SCI was under a tight time deadline and could not afford to waste time before beginning work. (TR 39, 57) He also contended the two insurance polices would require the same amount of premium, per unit of work, "unless [SCI's] quantities changed [declined] by more than twenty-five percent (25%)". (TR 87) Mr. Huskey admitted that under Specification 717-01 mobilization costs should include costs of insurance. (TR 78, 92; see also Hall testimony at 218) Mr. Borden also testified it was probably a mistake to include the insurance premium in the proposed SA. (TR 128)

In support of SCI's position on wasted labor in the amount of Twenty-Two Thousand Five Hundred Ninety Dollars ($22,590.00), Mr. Huskey asserted that when the extent of the partial depth repair work was determined [after the pavement had been removed from the bridge surface], he already had three shifts of workers standing ready to do what turned out to be a lesser amount of work. (TR 57-58) At the time he approved the SA, Mr. Bane testified he thought the wasted labor

charge was appropriate. (TR 177) He also testified the rental charges for the jackhammers and compressors, Bobcats, and the Snooper/Hydra-Platform were appropriate. (TR 177, 186-87)

Mr. Huskey testified the Two Thousand One Hundred Seventy-Five Dollar ($2,175.00) charge for the railroad flagman was affected by the quantity of material removed and that there was a minimum rental period for the Snooper of three months. (TR 88) Mr. Huskey also believed that the containment materials and equipment could be used not only on this project but on others and at this point, he had only been paid for a percentage of their costs in light of the lessened amount of work done.

As the proof showed, at some undetermined point Mr. Hall did a computation of his own regarding the nine (9) contested items, and assuming that SCI was entitled to a unit adjustment, he concluded that under such a scenario, it could be argued the contractor might be entitled to an additional Fifty Thousand Seven Hundred Sixty-Five and 18/100 Dollars ($50,765.18). (TR 69, EXH 9)

II. Applicable Law

In this case, the Commission previously determined the Claimant is due additional monies under TDOT Contract Number CNC243, as unit adjustments, in light of reduced amounts of square yardage for partial and full depth repairs which the contractor was actually required to complete in connection with its work performed on the Henley Street Bridge. The Commission's findings regarding this initial issue are set out fully in the decision rendered from the bench on September 22, 2008, attached hereto and incorporated herein as Exhibit 1.

The Claimant, without opposition, was permitted to amend its original claim to assert a demand for interest and attorney's fees pursuant to the provisions of the Prompt Pay Act of 1991, Tennessee Code Annotated, Section 66-34-101, et seq. Section 66-34-602(b) of that Act provides

that attorney's fees may be assessed against the State if it is determined that the State acted in bad faith in denying SCI's claim for additional compensation. Additionally, pursuant to Tennessee Code Annotated, Section 66-34-601, the Claimant may recover interest at the rate prescribed in Tennessee Code Annotated, Section 47-14-121, "from the date due until the date paid," if the Claimant shows it was not paid "in accordance with the schedule for payments established within the contract and within thirty (30) days after application for payment is timely submitted." (See Tenn. Code Ann. § 66-34-202(a).) Tennessee Code Annotated, Section 66-34-602 provides that in the event a contractor is not timely paid, it may notify the defaulting party by registered or certified mail, return receipt requested that unless payment is made or a response tendered setting out adequate legal reason for failure to make such payments, then the notifying party may "...in addition to all of the remedies available at law or in equity, sue for equitable relief, including injunctive relief, for continuing violations of this chapter, in the Chancery Court of the county in which the real property is located." Tennessee Code Annotated, Section 66-34-602(a)(13).[4]

The Prompt Pay Act is applicable to construction contracts with the State and any of its departments or agencies. (See Tenn. Code Ann. § 66-34-701.)

In Tennessee, good faith performance on the part of each party to a contract is a duty. *Wallace v National Bank of Commerce* at 686. This lawful duty of good faith and fair dealing is presumptively known by all of the contracting parties. *TSC Industries, Inc. v Tomlin,* 743 S.W.2d 169,173 (Tenn. Court App. 1997), citing Restatement 2d Contracts Section 205 (1979). However, a determination of whether the parties have performed their obligations under a contract in good faith requires that their actual performances be measured against the language and terms set out in the

[4] The Court of Appeals in *Rose v Raintree,* No. W2000-01388-COA-R3-CV, 2001 WL1683746 (Tenn. Court App.) held that Chancery Court is not the only jurisdiction in which Prompt Pay Act remedies may be sought. *Id.* at *5.

contract. *Id.* at 686.

Should they so choose, the contracting parties themselves may determine in their agreement those standards by which performance may be measured. *Id.* at 686. *See also Covington v. Robinson*, 723 S.W.2d 643, 645-646 (Tenn. App. 1986) and *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 91 (Tenn. App. 1988).

Only the "objectively reasonable expectations of the parties ... will be examined in determining whether the obligation of good faith has been met." *Wallace v National Bank of Commerce,* at 686, quoting *Tolbert v. First Nat'l Bank*, 823 P2d 965, 971 (1991); *Goot v. Metropolitan Govt. of Nashville and Davidson County*, 2005 WL 3031638 *7 (Tenn. App.).

Although arguably a simplistic approach to any discussion of the topic of good faith, Black's Law Dictionary, (6th Ed. 1990), at p. 693, provides a useful benchmark for determining whether good faith or bad faith has been exhibited in any particular setting. In *State v. Golden*, 941 S.W.2d 905, at 908 (Tenn. App. 1996), the Court cited Black's for the general proposition that "bad faith may be defined as the state of mind involved when one is not being faithful to one's duty or obligation".

Of course, this implied-in-law covenant of good faith and fair dealing accomplishes two salutary purposes. First, "...it honors the contracting parties' reasonable expectations." Secondly, it affords protection to each party for the benefit of the bargain they struck between themselves. *Id.* at *7; *see also Barnes and Robinson Company, Inc. v. OneSource Facilities Services, Inc.*, 195 S.W.3d 637, 642 (Tenn. App. 2006).

At the hearing in this case on the bad faith issue, both parties readily admitted there is a relative dearth of case law in Tennessee regarding the application of the Prompt Pay Act in the construction contract area. In fact, there does not appear to be either a reported or un-reported decision applying this particular piece of legislation in a State contract setting. Accordingly, the

Court of Appeals decision in *Trinity Industries, Inc. v. McKinnon Bridge Company, Inc.*, 77 S.W.3d 159 (Tenn. App. 2001) was a welcome addition to the State's jurisprudence in the frequently high stakes construction contract area. Although the State, through TDOT, was a party to that litigation, the issue of a bad faith penalty under the Prompt Pay Act did not involve the State.

In briefly addressing the good faith/bad faith issue, the *Trinity Industries* Court said the following:

> The Act [Prompt Pay Act] does not define bad faith. There are, however, cases defining bad faith in other areas of the law. ... There are more cases interpreting what amounts to good faith under the Uniform Commercial Code's definition as honesty in fact in the conduct or transaction concerned. In *Glazer*, [*Glazer v. First American Nat'l Bank*, 930 S.W.2d 546 (Tenn. 1996)] the Court explored the various meanings of honesty and concluded that bad faith should be construed as 'actions in knowing or reckless disregard of ... contractual rights'. We would add that the definition should include rights or duties under the contract. In *Huntington*, [*Huntington Nat'l Bank v. Hooker*, 840 S.W.2d 916 (Tenn. App. 1991)] we said that good faith imposes an honest intention to abstain from taking any unconscious advantage of another, even through the forms and technicalities of the law. *Id.* at 181 (some internal citations omitted). (Emphasis supplied.)

Intentional and reckless conduct was discussed by the Tennessee Supreme Court in *Doe v Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005):

> Recklessness is a hybrid concept which resembles both negligence and intent, yet which is distinct from both and can be reduced to neither. 'A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result.' Although the reckless actor intends to act or not to act, the reckless actor lacks the 'conscious objective or desire' to engage in harmful conduct or to cause a harmful result. 'Recklessness and negligence are incompatible with desire or intention.' The reckless actor 'does not intentionally harm another, but he intentionally or consciously runs a very serious risk with no good reason to do so'. Nevertheless, recklessness contains an awareness component similar to intentional conduct which is not demanded of negligence. Recklessness 'entails a mental element that is not necessarily required to establish gross negligence.' 'The element of awareness of risk ... does distinguish

> between recklessness and negligence.' *Id.* at 38. (Internal citations omitted.)

Bad faith has been defined in states other than Tennessee and in the Federal System on occasion.

In *Proctor v Kewpee, Inc.*, 2000 WL 44556 *6 (Ohio App. 3 Dist., 2008) the Court wrote:

> Bad faith has been defined as a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another. *Id.* at *6.

The Court in *United States v Convertino*, 2008 WL 2008613 (E.D. Mich., 2008) cited *United States v Trew*, 250 F.3d 410 (6th Cir. 2001) for the following definition of bad faith:

> Bad faith is defined as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will". *Id.* at 418.

Because it contains an explicit definition of good faith, the Uniform Commercial Code often serves as a reference point for analyzing that issue. Many of the cases discussed in the *Trinity Industries* case confirm this observation.

Tennessee Code Annotated, Section 47-1-203 imposes a duty of good faith in the performance or enforcement of a contract falling within the Code's purview. Further, good faith is defined in the Code as honesty in fact in a parties' conduct or in a particular transaction. Tenn. Code Ann. § 47-1-201(19); *see Lane v. John Deere Company*, 767 S.W.2d 138, 140 (Tenn. 1989).

All the Uniform Commercial Code requires contracting parties to do is to "act honestly in the conduct of business", as required by Tennessee Code Annotated, Sections 47-1-102(3) and -201(19). *Id.* at 92; *see also Glazer v. First American Nat'l Bank*, 930 S.W.2d 546, 548 (Tenn. 1996) and *McConnico v. Third Nat'l Bank*, 499 S.W.2d 874 (Tenn. 1973).

Finally, although the parties to a contract "...may not totally disclaim the obligations of good faith, diligence, reasonableness and care", by the terms of that same agreement, they are permitted to set up measurement standards for the performance of their respective duties under the contract. *Crockett v. Cullipher*, 752 S.W.2d 84, 91 (Tenn. Court App. 1988)[5]

III. Decision.

The enforceability of contracts entered into by competent parties is, should be, and must be a bedrock principle of Tennessee Law.

The issues raised in this particular case are interesting and in some respects somewhat unique.

The contract between the State and SCI, as observed earlier, is counter-intuitive for here, SCI under Specification 104.02 is actually due more money for performing less work than it originally thought it would be doing. However, as discussed at length previously, as well as in the Commission's bench decision of September 22, 2008, there is nothing unfair about such a proposition. Here, it was imperative that a major bridge in Knoxville be repaired expeditiously given the volume of traffic which travels regularly over it, as well as the various venues it connects. Accordingly, the contract contained both a Five Thousand Dollar ($5,000.00) per day incentive for early completion, as well as a Five Thousand Dollar ($5,000.00) per day disincentive (or penalty) if the work was not completed by August 31, 2004.

As the Commission previously ruled, in order to avail itself of the possibility of earning the bonus which TDOT freely included in its bid proposal, as well as avoiding the imposition of a

[5] The *Lane* Court, *supra*, quoting a passage from a law review article which cited a Kentucky court's decision in *Warfield Natural Gas Co. v. Allen*, 59 S.W.2d 534, 538 (1933), sets forth a succinct yet insightful definition of good faith. "The good faith requirement is independent of particular privileges and duties that arise under the code or under the contracts. It imposes 'an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of the law'." *Id.* at 140.

potentially devastating Five Thousand Dollar ($5,000.00) a day penalty, SCI, and the other bidders on the project, necessarily had to provide for the allocation of workers and materials to a bridge project, the scope of which was difficult for the State's pre-project estimator to describe and likewise difficult for contractors to bid on since the extent of what needed to be done could not be determined until the paved surface of the bride had been stripped away.

Therefore, in many respects both the State and the various bidders were guessing, in good faith, as to what the requirements of the project would be. It should also be kept in mind, as discussed previously, that both SCI and the State ran the real risk of suffering losses if unit underruns or overruns did not exceed seventy-five percent (75%) or one hundred twenty-five percent (125%) respectively of the projected costs involved in the work.

It has been and remains somewhat curious to the Commission as to why neither of the parties discussed Specification 104.02, subparagraph 2 under a subsection captioned "Differing Site Conditions". That subsection reads, in part, as follows:

> 2. Upon written notification, the Engineer will investigate the conditions, and if he determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing accordingly. The Engineer will notify the Contractor of his determination whether or not an adjustment of the contract is warranted. (Emphasis supplied.)

There are two important aspects to this passage. First, there has been no evidence whatsoever presented to the Commission that when it became clear to both parties there would be an "underrun" in the amount of work SCI would be doing on the Henley Street bridge that the contract was ever modified in writing. This is perhaps understandable given the alacrity with which both parties understood the project needed to be completed. Nevertheless, the contract specification did seem to call for a written modification.

Secondly, it is clear under the terms of the specification put out by the State that any unit price adjustments would not include a profit component. This would seem to emphasize the fact that unit price adjustments are the consequence of unanticipated changes in the scope and cost of the work for both the Contractor and the State. Therefore, under the very terms of the contract, the fact that the Contractor may have received a bonus for completing its work ahead of schedule logically should not factor whatsoever into whether or not SCI should receive additional monies for an underrun in the square yardage of work done on the Henley Street Bridge. The unit price adjustment appears not to include a profit factor but rather is a mechanism by which a contractor can recover its costs when it has purchased the wherewithal to complete what was originally thought to be a greater amount of work. There is no profit in a unit price adjustment.

Further, the Commission finds absolutely no contradiction between the provisions of Section 104.02 of the Specifications (Exhibit 2) and the note found in the upper left-hand corner of Exhibit 4. Certainly, both the State and SCI entered into this contract with the understanding that under unknown contingent circumstances, items involved with both the partial depth and full depth repairs of the bridge could result in an increase, a decrease, or an elimination of the need for certain component quantities of the project. There is absolutely no contradiction between that provision and the provision of Section 104.02 which provides for possible adjustments in money earned by the Contractor and paid by the State in the event such changes should eventuate.

The attempt by the State to create a contradiction between these complementary terms must fail.

The Commission does not accredit Mr. Bane's attempt to take the blame for purportedly failing to appreciate any now perceived contradiction between these two provisions. (TR 186) In fact, Mr. Bane's willingness to take the blame appears to be an attempt on the part of the State to

develop an after-the-fact justification for denying the unit price adjustment. Actually, Banes' colleague – Borden – admitted at trial that at deposition he had testified Mr. Hall told him he was going to deny SCI's claim because it had performed less work which made it possible for the contractor to proceed more quickly, and yet had received a bonus. Consequently, the State was now going to pay additional money for less work done. In fact, Mr. Hall told Mr. Borden that he was reviewing the SA with such a consideration in mind. (TR 190)

Mr. Hall's testimony both at trial and at his deposition along with his correspondence in this case also reveals a shifting rationale on his part over what has now become a four year period of dispute regarding this SA.

At trial, Mr. Hall testified that certainly the fact SCI received a bonus should be considered in reviewing this situation. (TR 212) However, he also testified his decision to deny the SA was, in fact, motivated by a presumed inconsistency between the terms of Exhibits 2 and 4 – an inconsistency which the Commission has determined not to exist. (TR 208) At yet another juncture in his testimony, Mr. Hall attempted to justify denial of the SA on the ground that the Exhibit 4 note somehow directs the contractor to allocate more fixed costs to the mobilization costs portion of the contract rather than to items such as full and partial depth repairs which may vary. If, in fact, all of the questioned fixed costs should have been allocated to the mobilization costs of the contract, then the bid proposal language should have been much more explicit. However, in the Commission's view, this line of reasoning again is an after-the-fact attempt to rationalize the denial of the SA. The testimony was extremely clear that if a bidder (such as SCI) allocated more than five percent (5%) of the total contract price to mobilization costs that the bid would be rejected or modified in order to bring those costs within the State's five percent (5%) limit. In this case, if the items which SCI now seeks an adjustment on had been included in mobilization costs, it appears that they, along with the

costs already placed in SCI's bid, would have exceeded five percent (5%) of the total contract price.

Mr. Hall's position at trial and the statements set out in his March 1, 2006, letter of denial to Mr. Huskey are also contradictory. Although at trial Mr. Hall admitted there was no conflict between the provisions of Exhibits 2 and 4, in his letter of denial he stated that the note on Exhibit 4 overrode Section 104.02 of the Specifications (Exhibit 2). Again, Mr. Hall's position at various times appears to travel from rationale to rationale in an attempt to find a way to deny SCI a unit price adjustment.

Although the State has consistently taken the position that only the Commissioner himself could make the ultimate decision on a unit price adjustment, Mr. Hall testified that once the Commissioner told him he needed an "explanation", he took it upon himself to make the decision as the Commissioner's designee and never took the issue back to the Commissioner after that point.

Accrediting Mr. Hall's testimony as to the assertion that ultimately he made the decision to deny SCI's SA, it is therefore clear that TDOT did not follow its own procedures in assessing this SA since he and not the Commissioner had to make the ultimate decision. The proof is that a Category I SA must be approved by the Commissioner of TDOT.

Finally, it appears there was real turmoil at TDOT regarding this whole situation since Mr. Hall testified the delay in the final denial of SCI's claim occurred because no one wanted to be the one to relay that decision to Mr. Huskey. (TR 215)

These shifting positions by TDOT regarding its justifications for denying SCI's claim certainly must be taken into consideration in determining whether attorney's fees should be paid by the State because of bad faith actions as authorized by Tennessee Code Annotated, Section 66-34-602(b).

All of these factors will be considered in making that decision.

Fixed Costs for Which Claimant is Entitled to a Unit Price Adjustment.

The Commission has studied closely the proof introduced at trial regarding the nine (9) items set out in Exhibits 11 and 12 for which SCI seeks unit price adjustments. The Commission FINDS that of those five (5) items discussed in Exhibit 11, SCI should not receive an adjustment for Railroad Protective Insurance since TDOT's Standard Specification 717.01 for road and bridge construction includes "insurance required by railroads" as an element of mobilization expense. Therefore, the Twenty-Five Hundred Dollars ($2,500.00) should not have been allocated to the full depth repair cost center utilized in SCI's bid. However, there is no such directive in Specification 717.01 requiring that Longshoreman's Insurance be used in the calculation of mobilization costs, and that adjustment is allowed in the amount of Nine Thousand One Hundred Twenty-File Dollars ($9,125.00).

The Commission FINDS the costs associated with Railroad Flagman insurance of Two Thousand One Hundred Seventy-Five Dollars ($2,175.00) and the Snooper/Hyrda-platform of Thirty-Four Thousand One Hundred Dollars ($34,100.00) are costs for which Claimant should receive a unit price adjustment. Finally, with regard to Exhibit 11, the Commission finds it difficult to precisely calculate what portion of the containment materials and equipment expense, which totals Thirty-Six Thousand Fifty-Two and 50/100 Dollars ($36,052.50), is eligible for a full depth unit price adjustment. The testimony at trial indicated that this category of materials and equipment involves basically scaffolding and boards used in connection with the work. Apparently, because of the decreased amount of work that actually occurred on this project, not as much scaffolding and plywood was necessary. Mr. Huskey testified this equipment is usable on other projects and, in fact, he had used perhaps ten percent (10%) of it on other work. All of the equipment/materials in this category are now stored on SCI's lot. Mr. Huskey asserted that the amount of such equipment

originally purchased was necessary for the project as bid. He also contended, at trial, that he paid for these materials even though all of it eventually turned out not to be necessary. It is disturbing to the Commission that Mr. Huskey was forced to buy this equipment and materials in order to bid the project as it was described to him but that eventually, even though he paid for it, he did not use it. On the other hand, it is also disturbing that if a unit price adjustment is ordered with regard to this equipment, then in essence, the State will be billed for equipment that may not be used on a TDOT state-related project. Accordingly, the Commission ORDERS that half of the sum claimed or Eighteen Thousand Twenty-Six and 25/100 Dollars ($18,026.25), be used in a computation for a unit price adjustment on the full depth repairs.

The Claimant, therefore, is awarded the sum of Sixty-Three Thousand Four Hundred Twenty-Six 25/100 Dollars ($63,426.25) to be used in the computation of a unit price adjustment for the full depth repairs.

Using this figure, instead of the Eighty-Four Thousand Dollar ($84,000.00) sum used by Mr. Huskey in his August 18, 2004, letter, and then utilizing the method Huskey used in computing the full depth unit price adjustment, the Defendant is ORDERED to pay Claimant for full depth unit price adjustments in the amount of One Hundred Twenty and 36/100 Dollars ($120.36) per square yard which would result in an adjusted figure of Four Hundred Twenty and 36/100 ($420.36) per square yard for full depth repairs on the bridge.

With regard to those four (4) items dealt with in Exhibit 12, regarding partial depth repairs, the Commission FINDS that the Claimant is entitled to unit price adjustments for the expenses involving jackhammers and compressors, BobCat rental, and wasted labor, amounting to Fifty-Six Thousand Five Hundred Forty Dollars ($56,540.00).

The Commission further FINDS that the saw blades and bits purchased for Twenty-Two Thousand Nine Hundred Fifty Dollars ($22,950.00) are not eligible for usage in calculating unit price adjustments for partial depth repairs. Although these blades and bits were purchased for use on the Henley Street bridge project, they were never used and remain with the Claimant for utilization on other possibly non-TDOT related projects.

Utilizing the method used by the Claimant in Exhibit 12, the Commission FINDS that SCI is entitled to a unit price adjustment on the partial depth repairs of Twenty-Four and 70/100 Dollars ($24.70) per square yard, resulting in an adjusted figure of One Hundred Four and 70/100 Dollars ($104.70) per square yard for actual work done in this category.

Proper interest payments

Tennessee Code Annotated Section 66-34-601 provides for the payment of interest, at the rate specified in Tennessee Code Annotated Section 47-14-121, on delinquent payments due pursuant to a contract commencing on the original due date for the payment.

The Prompt Pay Act also provides in Tennessee Code Annotated Section 66-34-602 that a contractor "who has not received payment from an owner" may send notice by registered or certified mail, return receipt requested of its "intent to seek relief provided for within this chapter". If the notified party does not respond to that notice within ten (10) days of its receipt, "giving adequate legal reasons for [the] failure of the notified party to make payment", then the contractor here may pursue legal or equitable relief including extraordinary injunctive relief.[6]

[6] Claimant could have sought relief before this Commission under Tennessee Code Annotated, Section 9-8-307(a)(1)(L) immediately after March 1, 2006, when Mr. Hall made it clear that the State was not going to approve the SA. This Commission does not have jurisdiction to award equitable relief. However, following appropriate notification under the Prompt Pay Act, SCI could have sought legal and equitable relief in either Chancery or Circuit Court following the State's denial to pay. Purely legal relief could have been earlier sought in the Commission since the Commission does have the power to grant that category of relief but not injunctive or other equitable relief.

In this case, Claimant's attorneys submitted billing records in support of their request for attorney's fees under the Prompt Pay Act. Those records indicate the Claimant first began preparations in connection with the letter provided for in the Prompt Pay Act on July 31, 2008. This is the first indication in this record of Claimant's invocation of the Prompt Pay Act. Theoretically, the procedures set out in Tennessee Code Annotated Section 66-34-602 could have been utilized in late 2005 when Mr. Hall verbally informed Mr. Huskey that the State was not going to pay the Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars ($81,593.01) adjustment which SCI sought.

It could be argued that Claimant's failure to utilize the procedure set out in Tennessee Code Annotated Section 66-34-602 prior to filing a claim on August 21, 2006, represents a failure to mitigate its damages. However, the provisions of Tennessee Code Annotated Section 66-34-601 appear to mandate that interest "shall accrue" from the date due until the date paid.

Certainly, the State always should have an adequate opportunity to evaluate whether or not any unit price adjustments are valid under the contract. This is only good business practice. But here, the Commission believes and has ruled that the Claimant was due unit price adjustments and that the State breached the terms of the contract - which it drafted - by not paying SCI additional square footage payments when the work done was significantly less than what had been thought necessary.

The Commission FINDS that as of March 1, 2006, the State finally decided, wrongly, in my opinion, no unit price adjustments were called for under the contract.

This being the case, it would also appear to be fair that interest on any unpaid sums for partial and full depth repairs at the rate specified in Tennessee Code Annotated, Section 47-14-121 would begin accruing from that date until the unit price adjustments are actually paid.

Therefore, the Claimant is awarded interest at the rate set out in Tennessee Code Annotated, Section 66-34-601 on the amounts just discussed above for adjustments for full and partial depth repairs. The Claimant is ORDERED to perform this calculation and forward the same to the Commission for inclusion in the Final Judgment in this case.

Attorney's Fees under the Prompt Pay Act.

Tennessee Code Annotated, Section 66-34-602(b) provides for payment of reasonable attorney's fees in the event that the Commission finds that the non-prevailing party has acted in bad faith.

Determining whether or not the State acted in bad faith in this case is an extremely serious question since the term itself carries with it a certain derogatory connotation. Nevertheless, the issue of bad faith must be decided

Determining whether or not bad faith has been exhibited by a party is a fact question. *Sunsplash Painting, Inc. v. Homestead Village, Inc.*, No. M2002-00853-COA-R3-CV, 2003 WL 22345482, *2 (Tenn. Ct. App.).

Both parties acknowledge there is very little appellate authority on point in Tennessee, with the exception of *Trinity Industries, Inc. v. McKinnon Bridge Company, Inc., supra,* providing guidance as to what bad faith consists of under the Prompt Pay Act.

Of course, the *Trinity* Court defined the concept as "actions in knowing or in reckless disregard of ... contractual rights". *Id.* at 181.

In this connection, SCI cited *Doe v. Roman Catholic Diocese of Nashville, supra,* in an attempt to flesh out the definition of recklessness. The *Doe* Court described a reckless actor as one who intended to act or not to act without a conscious objective or desire to engage in harmful conduct or to cause a harmful result. *Id.* at 38.

Some courts have provided a perspective on bad faith by discussing what constitutes good faith. One Court described "good faith" as "an honest intention to abstain from taking unconscientious advantage of another, even through the forms and technicalities of the law". *Lane v. John Deere Company, supra,* at 140, citing *Warfield Natural Gas Co. v. Allen,* 59 S.W.2d 534, 538 (1933).

Another Court, in a case discussed above, defines bad faith in terms of a dishonest purpose, moral obliquity, conscious wrongdoing, breach of [a] known duty through some ulterior motive or ill will partaking of the nature of fraud. *Proctor v. Kewpee, supra,* at *6. *Proctor* also described bad faith as involving the actual intent to mislead or deceive another. *Id.* In *Convertino, supra,* at *2, citing *Trew, supra,* at *418, the Court defined bad faith as the conscious doing of a wrong because of a dishonest purpose or moral obliquity contemplating a state of mind affirmatively operating with furtive design or ill will.

In this case, the Commission certainly does not detect the presence of outright dishonesty or even worse, moral obliquity, on the part of the State in first approving and then withdrawing its approval of the unit price adjustments on the Henley Street Bridge project.

It is abundantly clear to the Commission that both TDOT and SCI, for valid individual reasons, wanted the Henley Street bridge repair project completed as quickly as possible.

It was certainly commendable and understandable for the State to monitor the expenditure of public dollars in a prudent manner. One would expect no less from their government. On the other hand, SCI no doubt wanted to earn a bonus and avoid an unlimited penalty as provided for in its contract with the State. Additionally, SCI also wanted to be paid for the resources it had lined up for this project based on estimates provided to it by the State of the amount of work necessary to complete the project. Certainly, no business can fail to purchase and allocate resources in a less than

accurate manner. Otherwise, a contractor, such as SCI here, in all probability will not be in business long.

In this case, seven (7) separate TDOT officials, from various levels within the Department, initially approved the SA submitted by SCI. Included within this group were onsite, day in day out engineers Braden and Bane, as well as Mr. Falkenberg, a licensed professional engineer and a thirty (30) year employee of TDOT, his supervisor in Nashville, Mr. Donoho, extremely experienced Region I Director Fred Corum, and at least in May of 2005, the State's Assistant Chief Engineer, Mr. Hall. Mr. Falkenberg not only thought the SA should be paid because it was the right thing to do; he also testified this same type of agreement had been regularly approved by TDOT in the past. He also pointed out that when actual work done by a contractor exceeded one hundred twenty-five percent (125%) of what had been originally estimated, the State had utilized its right under various contracts to seek reductions in unit prices from contractors.

The State, as borne out by the proof, appeared to argue at one point that the nine (9) items comprising the SA should have been allocated to mobilization costs rather than to items of the contract involving full and partial depth repairs where unit price adjustments could be sought. However, this position is not sustainable since, other than the Railroad Insurance costs explicitly provided for in Standard Specification 717.01, there is no proof whatsoever that the contractor had been directed or required by the State, in this contract, to allocate those costs to mobilization costs. Additionally, it is clear to the Commission that allocating the eight (8) other questioned costs to mobilization would have resulted in the Claimant exceeding the State's own requirement that those costs not exceed five percent (5%) of the total contract amount. There is also proof in this record that the State reviewed allocation of mobilization costs when a contract is first let. There is no proof in this record that there were any complaints made to SCI by TDOT at that time regarding allocation

of various items to mobilization costs rather than to the partial and full depth repairs of the bridge.

The State as the drafter of this contract could have specifically included language in the contract, such as it did with regard to the Railroad Insurance, requiring allocation of the eight (8) other contended items of costs to mobilization. This it did not do.

Additionally, the State also has attempted to avoid approval of the SA by creating a conflict between provisions found in Exhibits 2 and 4. However, the Commission FINDS these exhibits to be complementary and not inconsistent. The fact that quantities may vary (see Exhibit 4) blends in very well with the proposition set out in Standard Specification 104.02 (see Exhibit 2) permitting both the contractor and the State to seek adjustments under the contract in the event that quantities of work done are actually under or over the amount of work believed necessary originally.

The Commission also believes the fact that SCI earned the full bonus for early completion of this important job was a motivating factor in the State's decision to deny any unit price adjustment. Certainly, the testimony was that Mr. Hall admitted as much in a conversations described at trial. The State later denied that the bonus issue affected its decision on unit price adjustments. The Commission does not accredit that testimony.

Strangely, two witnesses who might have been able to shed some light on the decision making process here never testified. Mr. Seger who is in charge of bridge construction for TDOT was never called by the State to explain why unit price adjustments were inappropriate in this case even though the testimony was that he agreed with the denial of the adjustments. Even stranger is the fact that the Claimant apparently never deposed or attempted to depose the Commissioner of TDOT himself in order to explain what his handwritten note on Exhibit 8 – "explanation needed" – meant.

Also significant, in this Commission's opinion, is the fact that Mr. Hall himself had actually prepared a computation setting out his opinion as to what SCI would have been due if it was determined that unit price adjustments were warranted. (EX 9.) Circumstantially, this indicates that TDOT had reservations about whether or not it was on sound footing in denying these adjustments.

The Commission affirmatively does not find dishonest purpose, moral obliquity, or a conscious wrongdoing on the part of the State. The State, through its officials, has a duty to act as a good steward of increasingly limited state resources. However, the Commission does find, under the *Trinity Industries, Inc.* decision, that the actions of the State in not paying the SA in this case was "knowing".

The proof is clear that SCI performed a great service in re-opening the Henley Street Bridge in an expeditious fashion. For that professionally done work, it earned a bonus which it was contractually due. However, it was also due a unit price adjustment, under the terms of its contract, since the amount of work which it had to perform was significantly less than what the State had indicated it would be required to do on this job. Preparing to do work of this nature is complex and requires a contractor to shift all manner of resources from other projects to this job. That shift may even include foregoing other opportunities. When the over allocation in this case occurred, the contractor did no more than it was permitted to do under the contract, i.e. seek a unit price adjustment, which the Commission would also note does not include a profit component. (See Standard Specification 104.02.)

The State's eventual declination to pay the unit price adjustments, after prior approval by seven (7) separate experienced road builders – its own employees – rests on a panorama of shifting rationales. This constantly morphing rationale process clearly made the people involved in it uncomfortable since Mr. Hall testified that nobody at TDOT wanted to be the one who gave Mr.

Huskey the final word. If the rejection of the SA was so clear under TDOT's view of the situation, then this Commission does not believe there would have been such hesitation in relaying the final decision to Mr. Huskey. This "knowing" failure to abide by the terms of the contract makes reasonable attorney's fees assessable against the State under Tennessee Code Annotated, Section 66-34-602(d).

The issue then becomes what amount of fees is due the Claimant.

The determination of the reasonableness of attorney's fees is within the Commissioner's discretion. The burden of proving reasonableness is on the party seeking such fees. The usual method of carrying such a burden is to tender an affidavit from the lawyer who actually provided the services. The Court itself may also draw on its own knowledge of the case as well its knowledge of fees payable for legal services. *Wright v. Wright*, No. M2007-00378-COA-R3-CV, 2007 WL 4340871, *3 (Tenn. Ct. App.).

The factors to be considered in determining the reasonableness of a fee generally have been understood for a number of years. *See Connors v. Connors*, 549 S.W.2d 672 (Tenn. 1980) and *Lee v. Lee*, No. E2006-00599-COA-R3-CV, 2007 WL 516401, *5 (Tenn. Ct. App.). Rule 1.5 of the Rules of Professional Conduct for attorneys found in Article XV of the Rules of the Supreme Court, Chapter 1, sets out ten (10) factors which provide definite guidelines in the determination of the reasonableness of fees. Those guidelines are as follows:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the

client;
(7) the experience, reputation, and ability of a lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent;
(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charged; and
(10) whether the fee agreement is in writing.

In this case, the Claimant's attorneys, up through October 24, 2008, have billed their client Fifty-Seven Thousand One Hundred Fifty Dollars ($57,150.00) for services rendered since December 28, 2006.

The lawyering in this case on both sides has been exemplary. The Claimant's attorneys work for a leading law firm in Knoxville, Tennessee, and their presentation of this case was organized, concise, and to the point. Counsel for the State, Mr. Holt, likewise presented the State's case in a very able manner. Mr. Holt is an experienced trial lawyer who has been known to this Commissioner for many years. The fact that Claimant's attorneys were litigating against Mr. Holt indicates that they faced a formidable task in the preparation for and trial of this case.

Both during the pretrial procedures and the trial of this matter, counsel for both parties conducted themselves with restraint, professionalism, and courtesy.

The Commission has undertaken a meticulous review of the billing records attached to Mr. Noell's Affidavit.

This is a case which initially involved a claim for "only" Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars ($81,593.01). Mr. Noell's Affidavit indicates that no less than three attorneys and three paralegals or perhaps law students were involved in handling this matter for the Claimant. As just stated, this case initially involved slightly over Eighty-One Thousand Dollars ($81,000.00). Frankly, the Commissioner wonders why so much legal talent was necessary in order to adequately handle such a relatively modest claim. Nevertheless, this Commission has reviewed

every entry in the Affidavits filed by Mr. Noell and finds there was very little duplication of effort in appropriately preparing and trying this case.

The result obtained by Claimant's counsel for the client has obviously been excellent. Counsel's recognition and utilization of the Prompt Pay Act on behalf of their client represents insightful legal work. Other contract cases which have been brought before the Commission have not included, in many instances, a Prompt Pay Act allegation. The resort to that Act represents good "lawyering".

Additionally, Mr. Noell made a good point in his closing argument. He stated that unless cases like this, involving a relatively small amount of money, are litigated vigorously, the State might perhaps be tempted in the future to deny payment of supplemental agreements (SAs) since the cost of litigating small claims would drive contractors away from any effort to vindicate valid contractual rights.

In order to pursue and prove the merits of its position in this breach of contract case, SCI was willing to engage quality legal talent to press its claim. The amount of its recovery should not be reduced because of legal expenses.

Therefore, the Commission ORDERS payment of attorney's fees to SCI, with the exception of those entries highlighted in yellow on Claimant's counsel's billing statements attached hereto as Exhibit 3. A review of the billing records leads the undersigned to conclude that there may have been some arguable duplication of effort in some instances.

Therefore, for the reasons set forth in this Decision, the Claimant is awarded unit price adjustments for the partial and full depth repairs on the Henley Street Bridge in the amounts set out herein; interest on that judgment, compounded beginning from March 1, 2006, to the date of this Decision; and attorney's fees as set out above and computed utilizing Exhibit 3 attached hereto.

Claimant's counsel is directed to prepare a Final Judgment consistent with the Commission's earlier bench decision and this Decision. That Judgment may incorporate by reference those two rulings by the undersigned.

ENTERED this the 23 day of January, 2009.

William O. Shults, Commissioner
P.O. Box 960
Newport, TN 37822-0960

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Final Judgment has been forwarded to:

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